

ORIGINAL

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MIRALBA CASTRO ROSAS, MIMI
SANTA CRUZ, ADEL DOGOM,
CHRISTOPHER ODMAN, AND
ROBERT BOUCHARD, Individually
and on behalf of all similarly situated
individuals,

Plaintiffs,

vs.

MACY'S, INC., MACY'S WEST
STORES, INC., DOES 1-10 inclusive,

Defendants.

Case No. CV11-7318 PSG(PLAx)

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

1 **Background**

2 1. In August 2011, Plaintiffs Miralba Castro Rosas, Mimi Santa Cruz, Robert
3 Bouchard, Adel Dogom, and Christopher Odman filed a putative class action
4 against Macy's, Inc. and Macy's West Stores, Inc. (collectively, "Macy's" or
5 "Defendants") in Los Angeles Superior Court.
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7 2. Plaintiffs allege various causes of action relating to failure to pay wages and
8 provide mandatory meal breaks, as well as claims for fraud, negligent
9 misrepresentation, and breach of contract. *See* First Amended Complaint
10 ("FAC"), ¶¶ 44-165.

11 3. Defendants removed the action to federal court in September 2011. Dkt #1.
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13 **Defendants' Motion to Compel Arbitration**

14 4. On November 17, 2011, Defendants moved to compel the claims of three of
15 the plaintiffs—Robert Bouchard, Adel Dogom and Christopher Odman
16 ("Plaintiffs")—into arbitration pursuant to its Solutions InStore Step 4 –
17 Arbitration program. Dkt #21.
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19 5. The remaining two plaintiffs—Miralba Castro Rosas and Mimi Santa
20 Cruz—elected to opt out of arbitration and thus are not part of Defendants' Motion
21 to Compel Arbitration. Exhibits 376 (Castro Rosas Opt-Out Form), 377 (Santa
22 Cruz Opt-Out Form).
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24 6. Plaintiffs are current and former sales associates employed by Macy's. *See*
25 FAC, ¶¶ 7-9.

26 7. Plaintiffs opposed the Motion to Compel on several grounds, one of which
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1 was their contention that they did not consent to the Solutions InStore Step 4 –
2 Arbitration program. With respect to that contention, Plaintiffs assert that they did
3 not attach their electronic signature to the Solutions InStore Acknowledgment
4 Form. By signing the form, an employee acknowledges that he received the SIS
5 Brochure, understands he is automatically covered by all four steps of SIS, and is
6 required to submit an Election Form within thirty days of hire in order to be
7 excluded from Step 4 – Arbitration. Dkt. #34.

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9 8. Defendants contend that its business records reflect that each of the
10 Plaintiffs signed the Solutions InStore Acknowledgment Form. Defendants
11 further contend that Plaintiffs failed to submit Opt-Out Forms within thirty days of
12 hire and are therefore bound to arbitrate their claims.

13 9. On April 17, 2012, this Court entered its Order Holding Motion to Compel
14 Arbitration in Abeyance Pending Summary Trial. Dkt. #45.

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16 10. In its Order, the Court upheld the validity of Macy's arbitration agreement
17 including the waiver of Plaintiffs' right to bring a class or collective action. Dkt.
18 #45, pp. 4-5.

19 11. However, given that Plaintiffs raised an issue of fact regarding the signing
20 of the SIS Acknowledgment Form, the Court ordered that a summary trial be held
21 on the sole issue of whether an arbitration agreement exists—specifically, whether
22 the Plaintiffs electronically signed the Solutions InStore Acknowledgment form,
23 which the Court noted would constitute a valid arbitration agreement. Dkt. #45,
24 pp. 8-11.

25 **Macy's Arbitration Program**

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27 12. For disputes with its employees, Macy's has established a four-step dispute
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1 resolution program known as Solutions InStore ("SIS"). The fourth and final step
2 of the SIS program consists of binding arbitration. Exh. 378 (Noeth Decl.), ¶¶ 4,
3 10.

4 13. Employees may elect to opt out of Step 4 – Arbitration by submitting a one-
5 page Opt-Out Form within thirty days of hire. Exh. 378 (Noeth Decl.), ¶¶ 8, 10-
6 12, 21.

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8 14. If an employee fails to submit an Opt-Out Form within thirty days, Macy's
9 regards the employee as having consented to arbitration. Exh. 378 (Noeth Decl.),
10 ¶¶ 8, 11, 12, 18-21.

11 15. An employee's election to participate in or to opt-out of Step 4 – Arbitration
12 is confidential. No one at the stores has access to an employee's election
13 information, including returned Opt-Out Forms. Exh. 378 (Noeth Decl.), ¶ 11.
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15 16. Macy's notifies employees of the SIS program in numerous ways, including
16 on Macy's job application, the SIS New Hire Brochure ("SIS Brochure"), the SIS
17 Plan document (which details the process and rules for the SIS program), and the
18 Election Form contained within the SIS New Hire Brochure. Exh. 378 (Noeth
19 Decl.), ¶ 16.

20 **Solutions InStore New Hire Acknowledgment Form**
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22 17. In addition, Macy's asks employees to sign the Solutions InStore New Hire
23 Acknowledgment Form ("SIS Acknowledgment Form"). By signing the form, an
24 employee acknowledges that he received the SIS Brochure, understands he is
25 automatically covered by all four steps of SIS, and is required to submit an
26 Election Form within thirty days of hire in order to be excluded from Step 4 –
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1 Arbitration. Exh. 379 (SIS Acknowledgment Form).

2 18. The SIS Acknowledgment Form is presented to employees during a
3 computer session in which employees electronically sign various other new hire
4 forms. The new hire on-line forms include: 1) an EEO form, 2) a job offer
5 checklist, 3) an associate handbook acknowledgment, 4) a direct deposit form, 5) a
6 W-4 form, 6) the SIS Acknowledgment Form, 7) a United Way form, 8) associate
7 discount information, and 9) an I-9 form. Exh. 380 (Odendahl Decl.), ¶¶ 3-10 and
8 383-386 (Exhs. C-F to Odendahl Decl.).
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10 19. When an employee signs these forms electronically, the employee must
11 enter his or her social security number, month and day of birth and zip code in
12 order to attach his or her "signature" to the document. Exh. 378 (Noeth Decl.), ¶
13 21.

14 20. At the time Plaintiffs were hired, other than the employees themselves, the
15 only individuals at the store with access to an employee's on-line new hire forms
16 were the Human Resources Manager Donna Pohle and the Human Resources
17 Administrator Hadia Barazi.
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19 21. Human Resources Manager Donna Pohle and Human Resources
20 Administrator Hadia Barazi deny affixing the respective Plaintiffs' electronic
21 signatures to the Solutions InStore on-line Acknowledgment Form, let alone to
22 any of the on-line new hire forms.
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24 **Adel Dogom**

25 22. On March 12, 2007 Adel Dogom completed a paper employment application
26 with Macy's. The paper employment application did not require nor does it
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1 contain his date of birth. Exh. 319.

2 23. On May 11, 2007, Dogom signed a Job Offer Confirmation for a position at
3 the Macy's Sherman Oaks store in California. Exh. 320.
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5 24. Also on May 11, 2007, according to Macy's records, Dogom completed his
6 on-line new hire forms from 6:09:44 EST through 6:38:01 EST. Exh. 322. In his
7 on-line forms, Dogom indicated the following—
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On-Line Form	Information Provided
Identity & EEO Information	Male/Married/White
Job Offer Checklist	Acknowledged
Employee Handbook	Acknowledged
Direct Deposit	Declined
W-4	3 allowances
Solutions InStore	Acknowledged
United Way	\$2 per pay period
Associate Discount	Pre-pay Account

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24 Exh. 322.

25 25. Finally, on May 11, 2007, Dogom completed Section 1 of Form I-9 and
26 Hadia Barazi signed and dated Section 2. Dogom's Form I-9 was a paper form,
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1 thus Macy's has no time-stamp records regarding when it was completed on May
2 11, 2007. Exh. 323.

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4 **Christopher Odman**

5 26. On October 18, 2007, Christopher Odman completed an electronic Macy's
6 employment application. Exh. 309.

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8 27. On October 19, 2007, Odman signed a Job Offer Confirmation for a
9 position at the Sherman Oaks, California Macy's store. Exh. 356.

10 28. On October 23, 2007, according to Macy's records, Odman completed his
11 on-line new hire forms from 1:59:54 EST through 2:22:14 pm EST. Exh. 310. In
12 his on-line forms, Odman indicated the following—
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On-Line Form	Information Provided
Identity & EEO Information	Male/Single/White
Job Offer Checklist	Acknowledged
Employee Handbook	Acknowledged
Direct Deposit	Declined
W-4	1 allowance
Solutions InStore	Acknowledged
United Way	\$0 per pay period

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Associate Discount	Pre-pay account
Form I-9	Completed Section 1

Exh. 310.

29. Because Odman completed an electronic Form I-9 on October 23, 2007, Macy's has an electronic timestamp record regarding both the signature of Odman on Section 1 of the Form I-9 (2:22:14 pm EST) and Hadia Barazi, the Human Resources Administrator who completed Section 2 of Odman's Form I-9 (2:25:20 EST). Exhs. 310, 332, and 368 (Bates Stamped MACYS001390, 7099, 7100-7107).

Robert Bouchard

30. Robert Bouchard had two stints of employment with Macy's—one with its Macy's Florida division and one in California with what was known as the Macy's West division at the time he was hired.

31. On November 3, 2006, Bouchard completed a paper Macy's employment application seeking employment with Macy's Florida division. Exh. 317. The paper Macy's employment application did not require nor does it include Bouchard's month and day of birth. *Id.*

32. Bouchard was hired and, according to Macy's records, he completed his on-line new hire forms for Macy's Florida on November 8, 2006 from 3:29:04-4:01:38 pm EST. Exh. 318. In his on-line forms relating to his employment in Florida, Bouchard indicated the following—

On-Line Form	Information Provided
Identify & EEO Information	Male/Married/White
Job Offer Checklist	Acknowledged
Employee Handbook	Acknowledged
Direct Deposit	Declined
W-4	1 allowance
Solutions InStore	Acknowledged
Terms/Conditions of Employment	Acknowledged
United Way	\$0.01 per pay period
Associate Discount	No account wanted

Exh. 318.

33. Bouchard's last day with Macy's Florida was November 21, 2007. He resigned his employment because he moved to California. Exh. 361 (Bates Stamped MACYS000032).

34. On November 30, 2007, Bouchard signed a Job Offer Confirmation for a position at the Macy's Sherman Oaks store in California. Exh. 313.

35. On December 1, 2007, according to Macy's records, Bouchard completed an on-line Macy's employment application. Macy's records reflect that Bouchard

1 completed his on-line employment application at 3:24:00 EST. Exh. 362 (Bates
2 Stamped MACYS001941).

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4 36. Also on December 1, 2007, according to Macy's records, Bouchard
5 completed his on-line new hire forms. Macy's records reflect that Bouchard
6 completed his on-line new hire forms from 3:39:06 EST through 3:51:54 pm EST.
7 Exh. 316. In his on-line forms relating to his employment in California, Bouchard
8 indicated the following—
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On-Line Form	Information Provided
Identity & EEO Information	Male/Married/White
Job Offer Checklist	Acknowledged
Employee Handbook	Acknowledged
Direct Deposit	Declined
W-4	1 allowance
Solutions InStore	Acknowledged
United Way	\$1.00 per pay period
Associate Discount	Existing account
Form I-9	Completed Section 1

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25 Exh. 316.
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1 37. Because Bouchard completed an electronic Form I-9 on December 1, 2007,
2 Macy's has an electronic timestamp record regarding both the signature of
3 Bouchard on Section 1 of the Form I-9 (3:51:54 pm EST) and Hadia Barazi, the
4 Human Resources Administrator who completed Section 2 of Bouchard's Form I-9
5 (3:55:03 pm EST). Exhs., 316, 332 and 369 (Bates Stamped MACYS000362,
6 7099 and 7100-7107).

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8 38. Dogom admits to being in the Sherman Oaks Macy's store on the day his
9 SIS Acknowledgment was signed. Odman and Bouchard have not presented any
10 evidence other than their testimony that they were not in the Sherman Oaks store
11 on the days their SIS Acknowledgment Forms were signed.

12 39. In addition to the three Plaintiffs, the only other individuals with access to
13 the Plaintiffs' On-Line Forms at the time of their hire were the Human Resources
14 Manager Donna Pohle and the Human Resources Assistant Hadia Barazi. Pohle
15 and Barazi did not affix the Plaintiffs' signatures to the Plaintiffs' On-Line Forms
16 or make changes to the Plaintiffs' On-Line Forms; nor did Pohle and Barazi have
17 the requisite personal knowledge necessary to complete the Plaintiffs' On-Line
18 Forms.

19 **Conclusions of Law**
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21 1. The Federal Arbitration Act ("FAA") governs arbitration agreements in
22 contracts involving interstate commerce. 9 U.S.C. § 1; *Moses H. Cone Mem'l*
23 *Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

24 2. The FAA states that written arbitration agreements "shall be valid,
25 irrevocable, and enforceable, save upon such grounds as exist at law or in equity
26 for the revocation of any contract." 9 U.S.C. § 2.
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1 3. The FAA allows "a party aggrieved by the alleged failure, neglect, or refusal
2 of another to arbitrate under a written agreement for arbitration [to] petition any
3 United States district court . . . for an order directing that such arbitration proceed
4 in the manner provided for in such agreement." 9 U.S.C. § 4.

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6 4. When deciding whether the parties agreed to arbitrate, courts generally
7 apply ordinary state law principles governing the formation of contracts. *First*
8 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

9 5. Under general principles of California contract law, a valid and enforceable
10 contract must satisfy the following elements: (1) parties capable of contracting; (2)
11 their consent; (3) a lawful object; and (4) sufficient consideration. *See U.S. ex.*
12 *Rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999).

13 6. While silence or inaction by a party generally does not constitute assent,
14 "where circumstances or the previous course of dealing between the parties places
15 the offeree under a duty to act or be bound, his silence or inactivity will constitute
16 his assent." *See Circuit City Stores, Inc. v. Najd*, 294 F.3d 1104, 1109 (9th Cir.
17 2002); *see also Quevedo v. Macy's, Inc.*, 798 F.Supp.2d 1122, 1133-35 (C.D. Cal.
18 2011) (holding that when a Macy's employee admitted receiving the SIS handbook
19 and signing the Acknowledgment Form, his failure to opt out constituted assent to
20 the arbitration agreement).

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22 7. The Solutions InStore on-line Acknowledgment Form combined with the
23 SIS Brochure it acknowledges receipt of has the requisite elements to create an
24 agreement to arbitrate if an employee does not opt out within thirty days. *See*
25 *Quevedo v. Macy's, Inc.*, 798 F.Supp. 2d 1122, 1133-35 (C.D.Cal. June 16, 2011).

26 8. The language of the SIS Acknowledgment Form—
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1 I have received a copy of the [SIS] brochure and Plan Document
2 . . . I understand that I have 30 days from my date of hire to
3 review this information and postmark my form to the Office of
4 [SIS] if I wish to exclude myself from coverage under Step 4 of
5 the program, Arbitration . . . I understand that I am covered by
6 and have agreed to use all 4 steps of [SIS] automatically by
7 taking or continuing a job in any part of Macy's, Inc.

8 —is sufficient to call an employee's attention to the terms of the arbitration
9 agreement and the necessity to opt out within thirty days. *See Quevedo v. Macy's, Inc.*, 798 F.Supp. 2d 1122, 1133-35 (C.D.Cal. June 16, 2011).

10 9. The SIS Brochure is equivalent to the form considered by the Ninth Circuit
11 in *Circuit City Stores v. Najd*, 294 F.3d 1104, 1109 (9th Cir. 2002), which "set out
12 in writing the significance of [the employee's] failure to opt out and described in
13 detail the mechanism by which [the employee] could express his disagreement."
14 Just as in *Circuit City*, Macy's SIS Brochure is sufficient to place an employee
15 under a duty to act or be bound, where silence constitutes assent to arbitrate.

16 10. California has adopted the Uniform Electronic Transaction Act (codified at
17 Cal. Civ. Code § 1633 et seq.) The Civil Code provides that a signature shall not
18 be denied legal effect or enforceability solely because it is in electronic form. Cal.
19 Civ. Code § 1633.7(a). Moreover, "[w]hether the parties agree to conduct a
20 transaction by electronic means is determined from the context and surrounding
21 circumstances, including the parties' conduct." Cal. Civ. Code § 1633.5(b).

22 11. The parties here agreed to contract through electronic means. First, the
23 express language of the SIS Acknowledgment Form indicates the parties agreed to
24 contract electronically. Moreover, the SIS Acknowledgment Form was presented
25 in the context of a series of forms with legal import (e.g., an EEO form, a direct
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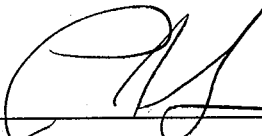
1 deposit form, a W-4 form, and an I-9 form), thus reasonably suggesting that
2 electronic signatures on these forms would be binding.

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4 12. The Court finds the testimony of Donna Pohle and Hadia Barazi in which
5 they denied affixing the Plaintiffs' electronic signatures to the Solutions InStore
6 Acknowledgment Form to be credible. In addition, the personal information
7 required for completion of the on-line forms suggest that only the Plaintiffs
8 themselves could have completed the on-line forms and affixed their electronic
9 signature to them.

10 13. Based on the evidence presented at trial, the Court finds that Macy's has
11 proved by a preponderance of the evidence that the Plaintiffs attached their
12 electronic signatures to the SIS Acknowledgment Form thus forming a valid and
13 enforceable agreement to arbitrate.

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15 IT IS SO ORDERED.

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17 Dated: 8/24/12

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19 PHILIP S. GUTIERREZ
20 United States District Judge
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